A **GLOBALTECH ENTERPRISE SDN BHD**

v.

COMMERCE ASSURANCE BHD

B HIGH COURT SABAH & SARAWAK, MIRI
STEPHEN CHUNG J
[SUIT NO: 22-55-2002(MR)]
24 APRIL 2013

C ***CIVIL PROCEDURE:*** *Costs - Bill of costs - Taxation - Getting up fee - Decision by Senior Assistant Registrar (SAR) - Appeal against award granted - Whether court disturbed decision of SAR - Whether any grounds to merit interference in exercise of discretion by SAR - Whether award granted reasonable - Whether SAR exercised discretion lawfully*

D ***CIVIL PROCEDURE:*** *Appeal - Fresh evidence - Admission of - Whether reasonable diligence would have made new evidence available at first instance - Whether admission of fresh evidence allowed - Rules of Court 2012, O. 56 r. 1(3A)*

E The defendant filed its bill of costs for taxation at RM627,343.70 which included RM625,000 for getting up. The Senior Assistant Registrar ('SAR') had taxed and allowed the getting up fee at RM60,000 which comprised of RM58,995.02 as disbursements and RM4,726 as allocatur fee. Therefore, the total taxed costs
F awarded to the defendant did not add up to the getting up of RM60,000. Dissatisfied, the defendant filed an appeal against the decision of the SAR under the Rules of Court 2012 by way of rehearing. The SAR did not allow disbursements in respect of travelling expenses incurred by counsel and witnesses since the
G defendant had not produced any documentary evidence as proof and thus, taxed off these disbursements. However, the defendant had produced vouchers, receipts, bills and invoices at the appeal stage against the decision of the SAR on the taxation of costs. The issues that arose for determination were, *inter alia*: (i) whether
H the SAR's discretion was exercised based on wrong principles; (ii) whether the quantum of costs awarded was wrong; and (iii) whether fresh evidence in relation to travelling expenses could be admitted during appeal.

I

Held (allowing appeal to the extent that costs was allowed at RM62,343.70 plus disbursements and allocator):

(1) The SAR must exercise his discretion judicially by considering the facts, skills, complexity of the case, specialised knowledge and the importance of the case to the parties. Failure by the SAR to consider such matters would mean that the SAR had erred in law. The court would not interfere with the decision of the SAR on a mere question of quantum. It was only when the SAR's discretion had been exercised on a wrong principle or the quantum allowed was obviously wrong that the judge would interfere. (paras 11 & 12)

(2) At the hearing of the appeal from the decision of the SAR, fresh evidence should not be admitted and referred to unless the judge was satisfied that at the hearing before the SAR, the new evidence was not available to the party who sought to use it. As such, it was obvious that the defendant would have had the bills and invoices in their possession when the bill of costs was prepared. Thus, the defendant could have produced the documents to support its claims to the disbursements at the taxation of costs. (paras 17 & 18)

(3) The amount of RM625,000 for getting up was exorbitant as the case was not complex and did not require experts or specialists to provide opinions on the issues in the trial. There was also no difficulty or novelty of the question involved in the case and could be easily decided on the questions of facts. The SAR had taxed and allowed the getting up at RM60,000. This sum was reasonable and there was no reason to interfere with the taxation of the getting up at RM60,000. However, the other fees and costs provided for in the bill of costs amounted to RM2,343.70 and was reasonable for the work done. These should be allowed. (paras 13, 14 & 15)

Case(s) referred to:

Chin Cham Sen v. Foo Chee Sang & Anor [1952] 1 LNS 15 HC ***(refd)***

Co-Operative Central Bank Ltd v. Tan Nyap How [1997] 1 LNS 414 HC ***(refd)***

Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors [1997] 5 CLJ 250 HC ***(refd)***

Malayan Trading Co & Anor v. Lee Pak Yin [1940] 1 LNS 53 HC ***(refd)***

A *Starlite Ceramic Industry Ltd v. Hiap Huat Pottery [1973] 1 LNS 143 HC* ***(refd)***
Union Insurance Malaysia Sdn Bhd v. Chan You Young [2003] 7 CLJ 50 HC ***(refd)***
United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 HC ***(refd)***
B *Vincent Cheng Kim Chuan v. The Minister of Home Affairs & Ors [1992] 2 CLJ 945; [1992] 4 CLJ (Rep) 527 HC* ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 56 r. 1(3A), O. 59 rr. 2(2), 7(1), (2), (3), 8,
C 10, 16(1), O. 94 rr. 1, 3(2)
Rules of the High Court 1980, O. 59 r. 36

For the plaintiff - Merlyn Toh; M/s Yi & Co Advocs
For the defendant - Albert Tang; M/s Chew, Jugah, Wan Ullok & Co Advocs

D *Reported by Sandra Gabriel*

JUDGMENT

E **Stephen Chung J:**

Ruling

[1] On 25 January 2011, the presiding High Court Judge dismissed the plaintiff's action with costs to the defendant.
F On 18 September 2012, the defendant filed its bill of costs for taxation. The bill of costs provided for costs of RM627,343.70 and disbursements of RM172,744.96.

[2] On 18 January 2013, the Senior Assistant Registrar (SAR)
G taxed the bill of costs at RM63,721.02 only inclusive of allocatur fee. The plaintiff has filed objections to the bill of costs to review the taxed costs and the defendant has filed an appeal against the decision of the SAR in respect of the taxed costs.

H **[3]** On 3 April 2013, the parties agreed not to proceed with the review of the taxation of costs and agreed to proceed with the appeal against the decision of the SAR under the Rules of Court. The appeal is by way of a rehearing.

[4] I have perused the grounds of decision of the SAR. He
I stated that having considered the grounds of the judgment of the learned High Court Judge, he taxed off RM741,093.64 and

awarded RM60,000 as getting up fee. However, he also stated that the total amount allowed inclusive disbursements was RM58,995.02 plus allocatur fee of RM4,726 ie, RM63,721.02. Therefore the total taxed costs awarded to the defendant inclusive of disbursements amounting to RM58,995.02 did not add up to the getting up of RM60,000, also awarded by him. The SAR has erred in his taxation of the costs.

[5] This appeal is heard under the Rules of Court 2012. Order 94 r. 1 of the Rules of Court 2012 provides that the Rules of the High Court 1980 (RHC) and the Subordinate Courts Rules 1980 were repealed. Order 94 r. 3(2) provides that all pending actions and applications that are commenced before the date of coming into operations of these rules shall, from the date of coming into operations of these rules (on 1 August 2012), proceed in accordance with the provisions of these rules. Order 59 r. 36 RHC no longer applies and there is no provision to review the taxation of costs under the Rules of Court 2012. From 1 August 2012, the Rules of Court have simplified some of the procedures regarding litigation and taxation of costs under the rules.

[6] Order 59 r. 2(2) of the Rules of Court (Rules) provides that subject to the express provisions of any written law and of these Rules, the costs of and incidental to the proceedings in the court shall be in the discretion of the court and the court shall have full power to determine by whom and to what extent the costs are to be paid.

[7] Order 59 r. 7(1) provides that costs may be dealt with by the court at any stage of the proceedings or after the conclusion of the proceedings. At the conclusion of the proceedings, the court will hear submissions from the parties as to the quantum of costs to be awarded and shall order such costs as it deems fit. The court shall direct that the submissions of the parties on costs are to be tendered as part of the submissions of the case. The parties shall annex a bill of costs including the particulars of work done including the value of getting up and all disbursements reasonably incurred: see O. 59 r. 7(2).

[8] In the case of an appeal, the costs of the proceedings giving rise to the appeal as well as the costs of the appeal and of the proceedings connected with it may be dealt with by the court hearing the appeal: see O. 59 r. 7(3).

[9] Order 59 r. 8 provides that in exercising its discretion as to costs, shall to such extent, if any, as may be appropriate in the circumstances, take into account the following: (a) any offer of contribution or offer of settlement; (b) the conduct of all the parties including conduct before and during the proceedings; (c) the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution; and (d) whether the parties have followed the practice directions for the time issued by the Registrar. In exercising its discretion as to the quantum of the costs to be awarded, the court may consider whether a party has unnecessarily or unreasonably protracted or added to the costs or complexity of the proceedings where a party has failed to establish any such claim or issue raised by him: see O. 59 r. 10.

[10] In assessing the costs payable, the court shall have regard to all relevant circumstances, in particular to (a) the complexity of the item or the cause or matter and the difficulty or novelty of the question involved; (b) the skill, specialized knowledge and responsibility required of and the time and labour expended by the solicitor and counsel; (c) the number and importance of the documents prepared and/or perused; (d) the place and circumstances in which the business involved in transacted; (e) the importance of the cause or matter to the client; (f) the value of the claim; and (g) any other fees and allowances payable: see O. 59 r. 16(1).

[11] In a taxation, the SAR must exercise his discretion judicially by considering the facts, the complexity of the case, the skill, specialized knowledge, the importance of the case to the parties and the work done or necessarily done etc: *Kamalam Raman & Ors v. Eastern Plantation Agency (Johore) Sdn Bhd & Ors* [1997] 5 CLJ 250; [1996] 4 MLJ 674. Failure by the SAR to consider matters which ought to be taken into account before exercising his

discretion would mean that the SAR has erred in law: *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd* [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163; [1991] 3 MLJ 181, *Co-Operative Central Bank Ltd v. Tan Nyap How* [1997] 1 LNS 414; [1997] 4 MLJ 568.

[12] Generally the court will not interfere with the decision of the SAR on a mere question of quantum if the SAR has exercised his discretion after consideration of all the circumstances and if no error of principle or some other material error arises. It is only when the SAR discretion has been exercised on wrong principle or the quantum allowed is obviously wrong that the judge will interfere: *Malayan Trading Co & Anor v. Lee Pak Yin* [1940] 1 LNS 53; [1941] MLJ 207, *Chin Cham Sen v. Foo Chee Sang & Anor* [1952] 1 LNS 15; [1952] MLJ 99, *Starlite Ceramic Industry Ltd v. Hiap Huat Pottery* [1973] 1 LNS 143; [1973] 1 MLJ 146, *Union Insurance Malaysia Sdn Bhd v. Chan You Young* [2003] 7 CLJ 50.

[13] I refer to the grounds of judgment of the presiding judge. He stated that he was reluctant to certify costs for two counsels although the case might not be the run of the mill case. He said that the issues in the case were not that complex and did not require experts or specialists to give opinions on the issues in the trial. He said that there was no difficulty or novelty of the question involved in the case and could be easily decided on the questions of facts.

[14] As stated above, the bill of costs provided for RM627,343.70 which included RM625,000 for getting up. Apart from the getting up fee, the other fees and costs provided for in the bill of costs amounted to RM2,343.70 only and were reasonable for the work done. These should be allowed. The amount of RM625,000 for getting up was obviously exorbitant, bearing the above comments of the presiding judge on the issue of costs.

[15] The SAR had taxed and allowed the getting up at RM60,000. In *United Malayan Banking Corp Bhd v. Sykt Perumahan Luas Sdn Bhd* [1991] 1 CLJ 594; [1991] 4 CLJ (Rep) 163 costs were allowed at RM65,000. In *Vincent Cheng Kim Chuan v. The Minister of Home Affairs & Ors* [1992] 2 CLJ 945; [1992] 4 CLJ (Rep) 527 costs were allowed S$65,000. The getting up of RM60,000 was reasonable and there is no reason to interfere with the taxation of the getting up by the SAR at RM60,000.

[16] On the disbursements in respects of travelling expenses incurred by counsels and witnesses, the SAR did not allow such disbursements because the defendant did not produce documentary proof such as vouchers, receipts, bills, invoices etc at the taxation of the costs before the SAR. The SAR ruled that such disbursements were not allowed in the absence of documentary proof. The SAR had taxed off these disbursements.

[17] The defendant had produced the vouchers, receipts, bills invoices etc at the appeal stage against the decision of the SAR on the taxation of costs. At the hearing of the appeal from the decision of the SAR, fresh evidence shall not be admitted and be referred to unless the judge is satisfied that at the hearing before the SAR the new evidence was not available to the party seeking to use it or that reasonable diligence would not have made it so available and that the fresh evidence would have had or would have been likely to have had a determining influence upon the decision of the SAR: see O. 56 r. 1(3A).

[18] Obviously the defendant and or its counsel would have such vouchers, receipts, bills and invoices etc in their possession when the bill of costs was being prepared. Obviously the defendant could easily have produced such documents to support its claims or entitlements to the disbursements at the taxation of costs but it failed to do so and no explanation was given for the non-production of these documents bearing in mind that the disbursements claimed were substantial.

[19] The appeal is allowed to the extent that the costs of the defendant are allowed at RM62,343.70, plus disbursements allowed by the SAR plus allocator. Interest is allowed at 4% from 18 January 2013 until full realization. The costs and interests to be paid out of the security for costs.